87-387

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. _____

* *

DEBRA HEYDEN,

Petitioner,

vs.

ROGER SCHOENFELD,
JOHN D. BILOTTI,
JOHN A. SERPE, STANLEY
KERKMAN, EUGENE BILOTTI,
JAMES FONK, and
DONALD ANDREOLI,

Respondents.

* *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Whether the time is ripe for this Court to set objective and consistent standards in employment gender discrimination cases under the 14th Amendment to the United States Constitution and Sec. 42 U.S.C. Sec. 1983.

Whether Federal Courts need further clarification of the standards to be applied in gender discrimination cases under the 14th Amendment to the United States Constitution and 42 U.S.C. Sec. 1983.

PARTIES TO THE PROCEEDING

All parties to the proceeding are contained in the caption.

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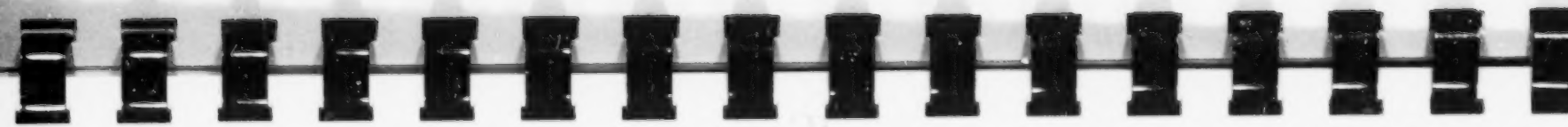

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OPINIONS BELOW

The judgment of the Court of Appeals (App. A) adopts in full the opinion of the District Court (App. B) which is reported at 640 F. Sup. 1274 (E.D. Wis., 1986), sub. nom. Sebetic v. Hagerty (App. B)

JURISDICTION

The judgment of the Court of Appeals (App. A) was entered on 5/21/87. Jurisdiction at the trial level was premised on 28 U.S.C. sec. 1331 and 28 U.S.C. sec. 1343(3). The appeal to the Court of Appeals was taken pursuant to 28 U.S.C. 1291. The jurisdiction of this Court is involved under 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provision

involved is the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the United States Constitution. The statute involved is 42 U.S.C. sec. 1983 and 42 U.S.C. sec. 1985. These are reproduced in Appendix C.

STATEMENT OF THE CASE

This is a suit brought under 42 U.S.C. Sec. 1983 and 42 U.S.C. sec. 1985, by Debra Heyden on 10/23/85 before the District Court for the Eastern District of Wisconsin. Ms. Heyden's claim for damages was based upon respondents' violation of her fundamental right to marry under the Due Process Clause of the Fifth Amendment as interpreted through the Fourteenth Amendment to the United States Constitution and upon respondents' violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, by denying her employment based upon sex discrimination.

Cross motions for summary judgment were filed with the trial court pursuant to Rule 56, Federal Rule of Civil Procedure. On August 12, 1986, the trial court granted summary judgment in favor of respondents and dismissed petitioner's complaint, awarding costs to respondents.

Debra Heyden filed a timely appeal with the U.S. Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. Sec. 1291. The Court of Appeals affirmed the judgment of the District Court on May 21, 1987.

In 1982, Kenosha City and County Joint Services was organized as a separate governmental employment unit to provide dispatch, clerical, and complaint taker services to the Kenosha Police Department, Kenosha County Sheriff's Department, and Kenosha Fire Department. Prior to 1982, the Kenosha Police Department, Kenosha County Sheriff's Department, and Kenosha Fire Department had utilized sworn officers within their

respective departments, to perform these duties.

On or about September 14, 1982, plaintiff Debra Heyden, a certified dispatcher for the Pleasant Prairie Police Department, a nearby township, who had earlier in September applied for the position of dispatcher with the Kenosha City and County Joint Services was advised that her application, which had mistakenly been filed as a clerical application was reinstated. On September 20, 1982, Debra Heyden passed the interview phase of application for employment. On September 29, 1982, Debra Heyden passed the written examination phase of application for employment. On September 29, 1982, Debra Heyden was advised by Mario Basuli, the manager for Kenosha City and County Joint Services that the job was hers and she would be told when to report to be fitted for a uniform. On September 30, 1982, Debra Heyden gave notice of resignation to her

present employer, Pleasant Prairie Police Department. After resigning her employment with Pleasant Prairie Police Department, Debra Heyden was never notified when she could report for work with Kenosha City and County Joint Services, nor until November, 1982, and December, 1982, was she advised as to why she would not be permitted to report to work.

On or about October 27, 1982, Kenosha City and County Joint Services board met and adopted the following policy rule:

> "policy was set by the board that a husband or wife of a Sheriff's Deputy or Police Officer will not be hired as a dispatcher and that the two wives who were the subject of the discussion would be offered a position in the records department." (See App. D)

The adoption of the policy affected Debra Heyden because she was and had at all times relevant been married to Richard Heyden, a Deputy Sheriff for Kenosha County. This policy also affected

Beverly Sebetic who was at that time employed as a dispatcher for Kenosha City and County Joint Services and married Deputy Sheriff Sebetic on December 17, 1983. They are the two wives referred to in the policy as adopted. Ms. Sebetic also filed an action which was resolved successfully through the State Administrative Agencies and is not before this Court. Also impacted, but unaffected by the policy as adopted was Kip Keckler, a dispatcher whose wife was a firefighter for Kenosha Fire Department.

On November 26, 1982, Debra Heyden and her spouse met with the Director of Joint Services, Roger Schoenfeld and were orally informed that based upon the policy he had recommended and which was adapted by the Kenosha City and County Joint Services, she would not be hired as a dispatcher. On December 14, 1982, Debra Heyden received written notification from Schoenfeld that she would not

be hired as a dispatcher for Kenosha City and County Joint Services based upon the policy adopted by the Board on October 27, 1982. On July 25, 1983, Debra Heyden was offered and accepted employment by Kenosha City and County Joint Services in their records division. The position she accepted in the records division of Kenosha County and Joint Services is a lesser paying position and not the position she sought in September, 1982.

REASONS FOR GRANTING THE WRIT

I. FEDERAL COURTS WILL BE REPEATEDLY REQUESTED TO ADDRESS THE VALIDITY OF NO-SPOUSE EMPLOYMENT RULES TO DETERMINE WHETHER THEY CONSTITUTE SEX DISCRIMINATION UNDER 42 U.S.C. SEC. 1983.

A.1. The Petition Should Be Granted Because The Increase of Women In The National Labor Force Coupled With The Concentration of Women In Low Paying Jobs Cannot Be Adequately Addressed Under Titel VII, 42 U.S.C Sec. 2000e et. seq.

Looking at the national data beginning with the year 1900, women were estimated to be 18.1% of the total labor force. Near the close of WWII, the labor

force consisted of 30% women. Since 1950, increase in female labor force participation has been steady, and by 1979 women constituted 41% of the national labor force. (See App. E.) If the number of women workers continues to increase at the present rates, by 1995 it appears a virtual certainty women will constitute 50% of the U.S. labor force.

The largest numerical and statistical increase of women in the labor force was observed in the 1970-1980 decade. (See App. E). It was also during this decade no-spouse rules began reaching the Federal Courts primarily through Title VII litigation as sex discrimination or sex discrimination based upon marital status. The results have been varied, as have the standards. While Title VII makes it unlawful for an employer to discriminate against any individual because of sex, (42 U.S.C.S., Sec. 2000e-2(a), Sec. 1[c] unless sex is a bona fide occupational qualification

reasonably necessary to the operation of the employer's business, it does not specifically address itself to an employer's use of distinction based on marital status. However, E.E.O.C. decisions and regulations indicate that such distinctions may constitute sex discrimination under Title VII. (29 CFR Sec. 1604.4).

Decisions under Title VII have held that employer distinctions based on marital status might be justified as a bona fide occupational qualification under 42 U.S.C.S. Sec. 2000e-2(e)(1). Phillips v. Martin Marietta Corp., 400 U.S. 542, 27 L. Ed.2d 613, 91 S. Ct. 496 (1971). Only when the marital status distinction has been applied differently between males and females have courts found such distinctions to constitute sex discrimination. Stroud v. Delta Air Lines, Inc., 544 F.2d 802 (1977 CA 5 GA). Sprogis v. United Air Lines, Inc., 444 F.2d 1194, (, CA 7 ILL. 1971) cert.

den. 404 U.S. 991, 30 L. Ed.2d 543, 92 S. Ct. 536. In Sprogis, a no marriage policy was struck down as discriminatory because male stewards were permitted to marry but female stewardesses were not. But in Stroud, a no marriage policy of an airline which hired only female flight attendants was held not to constitute sex discrimination because there was no dissimilarity in treatment between the sexes.

No spouse rules involving co-employees have generally been upheld as not constituting sex discrimination, even though the results of these rules has had the effect of loss of employment or income on female spouses. In Harper v. Trans World Air Lines, Inc., 525 F.2d 409 (1975 CA 8 MO), the Court upheld a rule requiring that spouses could not work in the same department, so the couple first must decide which spouse would resign, and if the couple could not agree, required the junior in seniority

to resign. In Yuhas v. Libby-Owens Ford Co., 411 F. Supp. 77 (1976 DC ILL.), the Court found a prima facie case of sex discrimination where 71 women and only three men were excluded from employment based upon a no-spouse rule, but upheld the no spouse rule because of the plausible assumption that it is generally a bad idea to have both partners in a marriage working together. Accepting the employer's speculative reasoning, the Yuhas court agreed that:

1) Married employees would not be able to set aside the intense emotions of their marital relationship in the work place.
2) Married employees could be expected to take the same side in a grievance or labor dispute.
3) Married employees might result in one spouse being placed in

a supervisory capacity over the other.

4) Married employees might intervene in the hiring process on behalf of one another.

The Yuhas decision is considered a leading case under Title VII in consideration of no-spouse rules. Yet, even often finding a prima facie case of sex discrimination, the Yuhas Court was swayed by "business necessity", and allowed the employer to continue a practice which clearly discriminated against women.

At one time, no spouse rules were upheld as management's prerogative. This is no longer the case. Courts and legislatures are beginning to develop limitations on these rules as married women become a greater percentage of the nation's labor force. While some no-spouse rules may promote legitimate employer concerns, many are based on

archaic and stereotypical notions concerning married women, the spousal relationship, and the family as it exists in our country today. Oft-times in reviewing the validity of no-spouse rules, fact finders are unintentionally caught in their own cultural biases for it is difficult to abandon cultural conclusions today, that seemed logical yesterday. For example, see Goesaert v. Cleary, 335 U.S. 464, 466, 93 L. Ed. 163, 69 S. Ct. 198 (1948), where the legislatures' right to preclude women from bartending on the ground that legislatures could devise preventative measures against moral and social problems that result when women tend bar. See Stanton v. Stanton, 421 U.S. 7, 43 L. Ed.2d 688 95 S. Ct. 1373 (1975), wherein the Court struck down a state statute that specified a greater age of majority for males than for females and found that the gender based classification was based upon traditional

assumptions that

> "the female is destined solely for the home and the rearing of the family and only the male for the marketplace and the world of ideas . . ." 421 U.S., at 14-15, 43 L. Ed.2d 688, 95 S. Ct. 1373.

The Goesaert and Stanton cases stand for rules which were thought at the time of inception to be reasonable. Few people could argue that the underlying premises about women embodied in Goesaert and Stanton concerning women would be found valid today.

Yet, in an age when 41% of our labor force is female and when 60% of all married couple families have two wage earners (Bureau of Labor Statistics of the U.S. Department of Labor, 1979), we cling to outmoded ideas concerning spouses in the workplace. Because of the historic dominance of men in the labor force, no spouse rules will more often than not, operate to preclude married women from employment. This is especially true in smaller communities

where there are limited employment opportunities. If a married woman, otherwise qualified is denied employment because her husband is already employed by the community's major employer, she is required to seek employment elsewhere which often results in lower paying employment, underemployment or no employment. The impact of such a result is felt throughout the community because it is frequently the wife's earnings which raise a family out of poverty. In 1979 14.8 percent of husband-wife families were poor when the wife did not work; 3.8% when she was in labor force. (See App. F)

Nor is it any secret that women workers are concentrated in low paying dead end jobs. The average woman worker earns only about 3/5 of what a man does even when both work full time year around. (See App. F) In Califano v. Webster, 430 U.S. 313, 51 Ed.2d. 360, 97 S. Ct. 1192 (1977), this court upheld a

statute conferring greater benefit to women than men because in part, the statutory scheme took into account that women "as such have been unfairly hindered from earning as much as men . . . " Id, at 318, 51 L. Ed.2d 360, 97 S. Ct. 1192.

Economic sex discrimination against women intentional or "unintentional" is one of the most invidious forces in our society today. Its causes are many, but identifiable causes, such as no-spouse rules which embody prejudices and worn out ideas, can and should be removed as impediments to employment. The underlying assumption society erroneously concludes about women is that they will be wives and mothers, they will work to supplement incomes, and therefore have a casual attachment to the labor force. Yet, with our inflated economy and reduced standard of living, nearly 15% of all husband-wife families will find it necessary for both spouses

to be fully employed in order to rise above poverty. To avoid the heavy burden to society imposed by the impoverishment of women workers any identifiable obstacle to the improvement of women's earning power in this country should be closely and carefully scrutinized.

No-spouse rules are an impediment to employment. While facially purporting neutrality because a spouse can theoretically be a man or a woman, reality is that no case has yet been decided where a man has been economically disadvantaged or denied employment because of a no-spouse rule. The impact of these rules has fallen squarely upon working wives and their families. While not overtly stating that wives will not be hired where husbands are already employed, no-spouse rules are a covert gender based classification because the rule will seldom, if ever, affect men. Husbands do not seek employment where wives are employed because wives along

with other women are concentrated in low paying dead end jobs. Wives who have otherwise obtained the necessary qualifications, will however seek employment in areas where husbands are employed because men historically occupy higher paying jobs. Sex discrimination is often pervasive and subtle, Caban v. Mohammed, 441 U.S. 380, 398 60 L. Ed.2d 297, 99 S. Ct. 1760 (1979), and can be embodied in rule of neutral in appearance, but when reality is considered, the rule may be far from neutral. To correct the low status of women in the labor force, and to remove identifiable impediments to improve women's economic position, no-spouse rules must be considered covert gender discrimination, and examined carefully to determine if a woman being married is a bona fide employment consideration or the stereotypical speculations of an employer who is reluctant to relinquish his historical prerogative, and has no market

force motivation to hire wives when an adequate supply of qualified men are available.

When courts rule on no-spouse regulations in a Title VII case, their focus is on balancing the claimed harm with the business necessity offered by the employer. The national condition of women in the labor force is beyond the scope of their review. The employer's prerogative is therefore often allowed to stand, as in Yuhas, to the detriment of women.

A.2 The Petition Should Be Granted Because No-Spouse Rules Are Formulated Upon Stereotypical Thinking That Operates To Preserve Sex Discrimination In the National Labor Force.

Employers offer many varied reasons for justification of no-spouse rules. Some have potential merit and some do not. The most frequently offered justification for no-spouse rules, indeed, one which seems to recur in every case is that "the mix of feelings which typically attends the marriage

relationship", Sebetic v. Hagerty, 640 F.Supp. 1274, 1275 (E.D. Wis. 1986), would be a negative force and detrimental in the workplace. A variation on this theme was propounded by the Yuhas Court wherein the Court agreed that married employees would not be able to set aside the emotional aspects of their marital relationships in the workplace.

Married couples do undoubtedly have emotional attachments to each other. Whether or not these emotional bonds would interfere with or even enter into the workplace is purely a matter of speculation. There is no empirical data or objective studies to support this belief. Is the implication that married couples are less emotionally stable than their unmarried counterparts? Highly unlikely, where the financial survival of the home, and family depends on both spouses obtaining and maintaining their employment. Highly unlikely, where the attendant responsibilities of marriage

generally operate to make people more responsible and reliable. Is the implication that married couples are unable to escape their emotional attachment when pitted together in a work task? Highly unlikely. If that were the case, the western frontiers of this county would have ended on the Atlantic seaboard. What then is the underlying assumption upon which so many employers and courts base their belief that married couples cannot competently labor side by side in the workplace? If married couples are successfully working together in their homes and with their families, why would they abandon that behavior in the workplace? Although unproven by empirical data or objective studies, this belief, more than likely emerges from the old and erroneous concept that women have only a casual attachment to the labor force and will therefore treat their employment less seriously and permit marital disputes to intervene in the

workplace. Who does society and the employer mistrust as far as emotional sobriety in the workplace, is it the husband, the couple, or is it in fact the wife?

Further, it is not only married couples who have heightened or intense emotional bonds. Following the Sebetic and Yuhas rationale, the "mix of feelings" which would supposedly create havoc in the workplace can also be found between parents and children, siblings, other relatives, lovers, and close friends. There is no rationale to single out the marriage relationship from other close human relationships as presenting potential problems in the workplace. It is profoundly insulting to single out the most stable human relationship in our culture and brand it a detriment in the workplace. As discussed previously, although expressed in terms of the marriage relationship, the detriment falls not on husbands, but on wives.

Other justifications for no-spouse rules, such as: spouses may take the same side in grievances or labor disputes, spouses may intervene for each other in the hiring process, or spouses might be in a position to supervise each other are no more unique to the marriage relationship than any other close relationship between co-workers either of a familial nature or not. Supervisory concerns can be handled by transfer, potential interference in hiring can be handled by company rule, and grievances or labor disputes as usual, are handled under the rule of contract, not by employees taking sides with each other.

No spouse rules per se produce more harm than good. They effectively preclude otherwise qualified female applicants from employment which is essential to the survival of the woman and her family at better than poverty levels. No spouse rules are more often than not based upon erroneous beliefs

concerning a less than serious attachment to the labor force by working wives and unproven superstition concerning the behavior of female spouses with male spouses in the workplace.

Employers who raise no-spouse rules as an employment obstacle to otherwise qualified female applicants should be required to do more than speculate or offer stereotypical thinking concerning wives and marital relationships. Employers should be required by courts to prove their hypothesis concerning wives and husbands working together. In the absence of proof, no-spouse rules should fall. Society can no longer afford the luxury of permitting management to erect barriers to working wives and subtly continue the concentration of women workers in low-paying jobs. No-spouse rules are a form of sex discrimination. As such, they should be subjected to a heightened standard of review. Only by

guidance from this Court will lower courts go beyond traditional notions and ideas when reviewing justifications for no-spouse rules.

Women's position in the national labor force is rapidly evolving into a major social issue. It is one that has reached constitutional dimension. The democratic process was unable to correct racial segregation without judicial intervention for the same reasons the economic plight of women will not be corrected by the marketplace alone. Women are a traditionally economically hindered group. They lack the means and resources to bring about the changes necessary through the democratic process.

The devaluation of the work done by women occurred as a result of how women were viewed throughout society. A change in society's view of women in the work place may be realized by our grandchildren, but not without direction from this Court. Neither employers nor the

marketplace have any incentive or motivation to modify pay scales or past practices to correct the economic injustices allocated to women in the labor force. The absence of constitutional guidance in this area leaves employers, workers, and courts alike, adrift in a crucial time of change within our labor force and society at large. It is essential these issues be addressed.

II. FEDERAL COURTS ARE IN NEED OF FURTHER CLARIFICATION OF THE STANDARDS TO BE APPLIED IN GENDER DISCRIMINATION CASES UNDER THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND 42 U.S.C. SEC. 1983.

A.1 The Petition Should Be Granted Because Federal Courts Need Further Guidance As To When Gender Discrimination Rises To The Level of Heightened Scrutiny.

Under the present two-tier equal protection analysis, if a governmental classification trammels a fundamental personal right or is drawn upon inherently suspect distinctions such as race, religion, or lineage, it is subject

to strict scrutiny, and can be upheld only if it is necessary to promote compelling governmental interests and is narrowly drawn to express only such interests. Roe v. Wade, 410 U.S. 113, 155, 93 S. Ct. 705, 35 L. Ed.2d 147 (1973); Shapiro v. Thompson, 394 U.S. 618, 634, 89 S. Ct. 1322, 22 L. Ed.2d 600 (1969); Griswold v. Connecticut, 381 U.S. 479, 14 L. Ed.2d 510 85 S. Ct. 1678 (1965); Loving v. Virginia, 388 U.S. 1, 18 L. Ed.2d 1010, 87 S. Ct. 1817 (1967).

Alternatively, if the rights involved are not considered fundamental or the classification does not burden an inherently suspect class, the classification is presumed valid so long as it is rationally related to furthering the stated government interest. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312, 49 L. Ed.2d 520, 96 S. Ct. 2562 (1976). U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166, 66 L. Ed. 368, 101 S. Ct. 453

(1980); New Orleans v. Dukes, 472 U.S. 297, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976).

Strict adherence to this framework would invariably subject gender discrimination to the bottom tier of analysis, unless an additional fundamental right was involved. This Court, however, has recognized that while not an inherently suspect class, Frontiero v. Richardson, 411 U.S. 677, 36 L. Ed.2d 583, 93 S. Ct. 1764 (1973), classifications based upon gender, not unlike that based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination. Caban v. Mohammed, 441 U.S. 380, 398, 60 L. Ed.2d 297, 99 S. Ct. 1760 (1979). This court has also recognized that women have historically been unfairly hindered by legislative attempts to exclude women from particular areas simply because legislators believed women less able than men to perform a

particular function. Mississippi University for Women v. Hogan, 458 U.S. 718, 725, 73 L.Ed.2d 1090, 102 S.Ct. 331 (1982). Thus, when government establishes a classification which has a disproportionately adverse effect on women, or which is overtly stated in male/female terms, a level of "heightened scrutiny" has been applied. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 60 L. Ed. 870, 99 S. Ct. 2282 (1979), and Mississippi University for Women v. Hogan, 458 U.S. 718, 73 L. Ed.2d 1090, 102 S. Ct. 331 (1982). Under this standard, the government is required to do more than show a rational relationship between its stated purpose and the classification. Under "heightened scrutiny", the government must show the the classification serves "important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." Mississippi

University for Women v. Hogan, 458 U.S. 718, 724, 73 L. Ed.2d 1090, 102 S. Ct. 331 (1982), citing Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150, 64 L. Ed.2d 107, 100 S. Ct. 1540 (1980), and Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 60 L. Ed. 870, 99 S. Ct. 2282 (1979).

The existence of this middle tier of scrutiny is abstractly straightforward, but it is often difficult for courts and citizens to perceive which rights under what circumstances will trigger what level of scrutiny.

As in Personnel Administrator of Massachusetts, a court must first decide if the classification is truly neutral or if it overtly or covertly is based upon gender. Because gender discrimination is subtle, a classification can on its face appear neutral, but be so riddled with exceptions and distinctions that as applied, it constitutes covert gender discrimination. If a court determines

such a classification to be truly neutral, it must then determine if the adverse effect is purposeful gender discrimination. In Personnel Administrator of Massachusetts, the Court found that Helen Feeney was disadvantaged by the Massachusetts veteran preference system, but held that the statute distinction between veterans and non-veterans was not purposeful sex discrimination. The District Court twice declared the Massachusetts statutory in this case unconstitutional prior to this Court's final determination. In Mississippi University for Women, the District Court held constitutional Mississippi's single sex university admission but was revered by the Appellate Court. The matter was resolved by this Court in 1982, holding Mississippi's admission policy to be unconstitutional. The Federal District and Appellate Courts, as evidenced by these two recent cases, are far from

settled in their approach to gender discrimination and in how to define its parameters. These two cases are relatively uncomplicated compared to the case now before this Court by virtue of this Petition. Debra Heyden not only raised gender discrimination concerning classification as applied, but gender discrimination based upon her marital status which interfered with her fundamental right to marry.

In Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed.2d 618 (1978), this Court affirmed the District Court of the Eastern District of Wisconsin's determination that there exists a constitutionally protected right to marry which occupies the status of being a fundamental right. The Zablocki Court struck down the Wisconsin statute which withheld permission to marry if a party was unable to show compliance with a prior child support obligation. In Boddie v. Connecticut, 401 U.S. 37, 91 S.

Ct. 780, 28 L. Ed.2d 113 (1971), the requirement of a filing fee from indigent parties in order to obtain a divorce was found to unreasonably interfere with a citizen's right to not be married. In Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed.2d 1010 (1967), the State of Virginia's miscegenation statutes were held to violate a citizen's right to select whom they would marry. In Loving, other fundamental rights were also involved because the statute further affected a traditionally disadvantaged group, black Americans. In Califano v. Jobst, 434 U.S. 47, 54 L. Ed.2d 228, 98 S. Ct. 95 (1977), a Congressional determination to terminate Social Security benefits upon the recipients' marriage was upheld. The Califano Court conceded that the Congressional rule did burden John Jobst, but found the rule a rational means of administering a complex statutory scheme. The Califano Court further noted that unlike the situation

presented in Loving, the Congressional rule "could not be criticized as merely an unthinking response to stereotyped generalizations about a traditionally disadvantaged group." Califano v. Jobst, 434 U.S. at 54. The implication of these decisions concerning the fundamental right to marry is that when governmental regulation of marriage negatively impacts a traditionallly disadvantaged group (i.e., indigents and racially identifiable groups) the government regulation will be reviewed with stricter scrutiny.

Debra Heyden is a woman. Women have historically been the victims of gender discrimination, and are a traditionally disadvantaged group. Women have been historically discriminated against in the labor market. Debra Heyden is no exception. Her chosen career was that of a law enforcement dispatcher. She worked as a dispatcher for the Pleasant Prairie Police Department before seeking to

improve her financial circumstances by applying for the dispatcher position with Kenosha City and County Joint Services. Debra Heyden was denied the Kenosha City and County Joint Services dispatching position for reasons other than lack of qualifications and like so many other women was barred from advancement in her chosen line of work. Debra Heyden was denied employment because she was a married woman, and therefore twice burdened, first as a woman and secondly because of her marital status.

Kenosha, Wisconsin, has a population of less than 90,000. It is a smaller community, with limited employment opportunity in the field of law enforcement dispatchers. Debra Heyden's ability to seek advancement in her chosen career was pitted directly against her right to be married or not married as she should choose. Had Debra Heyden lived with, been divorced from or engaged to Richard Heyden, there would

have been no obstacle to her employment with Kenosha City and County Joint Services. Ms. Heyden's choices were narrow. She could have her career or her husband, but not both. To societies' benefit, she chose to keep her marriage intact, but in doing so submitted to the traditional forces which have combined to unfairly hinder women in the marketplace. Debra Heyden was fortunate to be able to recapture her position with the Pleasant Prairie Police Department but at a great loss of wages. (See App. Q)

Debra Heyden looks to this Court to recognize that in this instance more was at stake than the economic burden imposed in Califano v. Jobst upon John Jobst by his marriage. John Jobst was not additionally discriminated against because of his gender, as was Debra Heyden. John Jobst was not barred from advancement in his chosen profession and was not a member of a group that has been systematically relegated to the lowest

levels of employment in the national labor force.

Debra Heyden looks to this Court to recognize that unlike Personnel Administrator of Massachusetts, the regulation herein challenged was not mutual and was applied in a discriminatory manner, and violated her fundamental right to marry.

Debra Heyden's challenges are multi-faceted and raise a number of discriminatory acts for scrutiny by this Court. Her questions cannot easily be answered by existing case law. The distinctions between the rational relationship analysis and the heightened scrutiny analysis, are not always clear in gender discrimination cases as indicated by the lower court decisions in Personnel Administrator of Massachusetts and Mississippi University for Women. It becomes even less clear when the rights involved are a mixture of economic, gender, and fundamental, touching on all

three levels of scrutiny. Therefore this Court should accept this Petition, clarify the standards which must be applied in cases of this nature and accord Debra Heyden's challenges the level of heightened scrutiny to which they were entitled.

A.2 The Petition Should Be Granted Because The Kenosha City and County Joint Services' No-Spouse Rule Was Invidious Gender Discrimination As Designed And Applied, Failing Any Conceivable Test of Rationality.

The Kenosha City and County Joint Services' no-spouse rule in its very inception was intended to apply only to women.

"The policy was set by the Board that a husband or wife of a Sheriff's Deputy or Police Officer will not be hired as a dispatcher and that the TWO WIVES who were the subject of the discrimination would be offered a position in the Records Department." (Emphasis supplied.) (See App. D)

This rule was conceived, drafted, introduced, and recommended to the Kenosha City and County Joint Services Board by Roger Schoenfeld, interim Director of Joint Services. Director Schoenfeld's stated purpose was to stamp out nepotism in his department (See App. Q), beginning with the wives of law enforcement officers. Director Schoenfeld apparently did not even consider that an anti-spouse rule should include husbands as well as wives if it was to be applied evenhandedly and without discrimination. At the time this rule was conceived and adopted, Kip Keckler, a male dispatcher for Joint Services, was married to a City of Kenosha firefighter, and was not required to terminate his employment, as were the two wives. (See App. G, H, and I)

Ms. Heyden inquired of Director Schoenfeld why Kip Keckler could continue dispatcher duties when his wife was employed by the fire department, yet she

would not be permitted to undertake dispatcher duties while her husband was employed by the Sheriff's Department. Schoenfeld advised Ms. Heyden that Keckler was "grandfathered in". (See App. Q) Mr. Keckler's "grandfather" status evolved into the "firefighter" distinction before the District Court and the Court of Appeals. A distinction which should not have survived the rational relationship test applied by the lower courts and most certainly would not survive the heightened scrutiny review to which it was entitled.

In Vance v. Bradley, 440 U.S. 93, 59 L. Ed.2d 171, 99 S. Ct. 939 (1979), a case involving economic deprivation based upon age discrimination, this Court held in applying the rational relationship analysis, that a Federal Court is not allowed to resolve evidentiary conflicts against the legislative classification on the basis that without convincing

statistics, the legislative classification constitutes nothing more than pure speculation. The government is therefore entitled to make "logical" assumptions which the challenging party must convince the Court could not reasonably be conceived to be true.

Even under the Vance standard, the rule in the present case cannot stand. It is so riddled with exception and distinction, that the rule in and of itself is irrationally directed toward women. The Kenosha City and County Joint Services' no-spouse rule first singles out Kenosha City and County Joint Services employees from other Kenosha County employees, because Kenosha County has no anti-nepotism rule and no other Kenosha County department has a no-spouse rule. The rule then singles out the class of dispatchers from other Joint Services employees. The rule thirdly distinguishes married dispatchers from unmarried dispatchers. The rule then

distinguishes dispatchers who have law enforcement spouses from dispatchers who have firefighter spouses. After the distinction dust has settled, the population over which this rule is directed is quite narrow and limited. In fact, the population governed by this rule is, just as stated by the Kenosha City and County Joint Services Board in adapting the rule, the two wives. (See App. D) In order to sustain this rule, it must be accepted that there is a logical distinction to be made between married and unmarried dispatchers as well as a logical distinction between wives of law enforcement officers and the husband of a firefighter. Lastly, the assumption that husbands and wives working in close proximity is detrimental must also be logical. There is no logical basis for these distinctions.

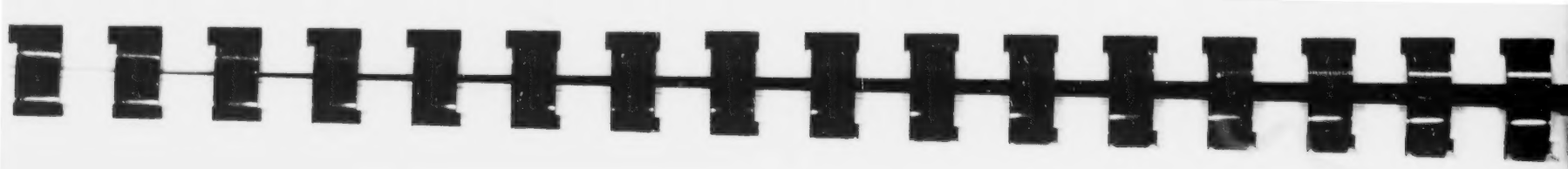
A dispatcher must respond with the same level head and degree of sobriety to a fire call as to a law enforcement

call. If the generalized fear of the Joint Services Board is that dispatchers will be unable to keep a level head when dispatching involves their spouses, then it is irrelevant whether a dispatcher is married to a law enforcement officer or firefighter. Male or female, the dispatchers' emotional responses to calls involving their spouses would be the same.

The exclusion of Mr. Keckler from the rule undercuts the alleged public safety purpose of the rule because his wife's occupation is as dangerous as any law enforcement officer's and his emotional responses to her being in danger would be no different than those of Debra Heyden. The fact that there have been no difficulties surrounding Mr. Keckler dispatching his firefighter wife is in and of itself evidence that spouses dispatching spouses into potentially dangerous situations has not been a problem. Further, Mr. Keckler's

exclusion from the rule exposes it as applied to be the intentional gender based discrimination that it is when coupled with Director Schoenfeld's avowed purpose to stamp out nepotism and begin with wives.

Debra Heyden's case is not concerned solely with economic deprivation as in New Orleans v. Dukes, 472 U.S. 297, 49 L. Ed.2d 511, 96 S. Ct. 2513 (1976). Nor does her case involve age discrimination as in Massachusetts v. Board of Retirement v. Murgia, 427 U.S. 307, 96 S. Ct. 2562, 49 L. Ed.2d 520 (1976), and U.S. Railroad Retirement Board V. Fritz, 449 U.S. 166, 101 S. Ct. 453, 66 L. Ed.2d 368 (1980). Economic deprivation cases have always been accorded the lowest level of scrutiny, and this Court has not yet found age to be a suspect class or even a "quasi" suspect class; so age, too, has always been accorded the lowest level of scrutiny. Debra Heyden's case should not



be judged by the lowest level of scrutiny as accorded economic and age cases, but by that heightened level of scrutiny accorded to gender discrimination, especially when other fundamental rights and issues are involved.

Her denial of employment based upon her status as a married woman under a purportedly neutral rule, which barred wives but not husbands from the same position; the persistence of economic discrimination against women; and the impingement of her fundamental right to marry; combine to demand that she be permitted a full hearing on this matter and that it be reviewed under a standard of heightened scrutiny.

Upon full hearing and review under the heightened scrutiny standard as applied in Personnel Administrator of Massachusetts v. Feeney, supra, and Mississippi University for Women v. Hogan, supra, the Kenosha City and County Joint Services Board will be required to

show that their no-spouse rule bears a close and substantial relationship to important governmental objectives. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. at 273. This test must "be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions." Mississippi University for Women v. Hogan, 458 U.S. at 725. The rule must also be reviewed to determine if it is purposeful discrimination. Swann v. Charlotte Mecklenburg Bd. of Education, 402 U.S. 1, 16, 28 L.Ed.2d 554, 91 S.Ct. 1267 (1971).

In balancing the purpose and objectives of the Joint Services no-spouse rule, with its discriminatory design and application, the Court must consider the disadvantaged position of women in the labor force and the obstacle it presented to Debra Heyden, rendering

her unable to improve her economic position and remain married, as well as the particular facts surrounding this rule and its inception.

The Joint Services no-spouse rule postures itself as equally applicable to men and women. All three county units served by Joint Services and its dispatchers are 95% men. At the time this rule was adopted, Joint Services had 21 employees on all three shifts, 17 women and 4 men. (See App. M) In the absence of a major sociological revolution in Kenosha, Wisconsin, it will be well into the next century before the Joint Services no-spouse rule will in reality apply as equally to husbands as to wives. Kenosha County has no anti-nepotism policy. Prior to the creation of Joint Services as a county department in 1982, the Kenosha Police Department, Kenosha County Sheriff's Department, and Kenosha Fire Department used sworn officers for dispatch duties.

(See App. L) No public safety issues were raised or regulations adopted by any of those three departments regarding employees who were close family members providing dispatch duties to each other. Each of these three departments had then and has now examples of fathers/sons, brothers, and other close relatives working side by side. Joint Services and its governing board was created to provide civilian personnel to perform dispatch and records services in order to free up sworn personnel for duty. As part of the contract negotiations between the city and county, the Kenosha Police Department, Kenosha County Sheriff's Department, and Kenosha Fire Department were assured that the civilian personnel would have no supervisory functions over officers or firefighters. (See App. L)

With the birth of Joint Services as a governmental entity, Director Schoenfeld, seeking to eliminate nepotism in Kenosha County, conceived, drafted,

submitted, and recommended on 10/27/82 that the Joint Services Board adopt a no-spouse rule which would apply only to the wives of law enforcement officers. Because this case has not had full hearing, Director Schoenfeld's rationale for singling out wives has not been offered. It can, however, be inferred from the fact that he considered only wife dispatchers to be unable to maintain their professionalism and level of job performance when their husbands were involved in field work but felt that the husband dispatcher would be capable of continued stable performance and professionalism when his wife was involved with field work. Director Schoenfeld's intent was to remove the two wives from dispatcher duties, and this he did. Safety considerations in this context cannot justify treating men and women in the same job differently.

A heightened scrutiny review will also reveal that the alleged safety

considerations are based upon generalizations, speculation, and stereotypical thinking regarding the emotional stability of spouses, i.e. wives, in a working relationship where their husbands are involved. The lower courts, in applying a rational relationship analysis, accepted the Joint Services Board's assertion that wives acting as dispatchers for husbands could present dangerous accidents or mishaps. Sebetic v. Hagerty, 640 F.Supp. 1274 (E.D.Wis. 1986), and held that therefore the no-spouse rule was a permissible means to achieve that objective. The lower courts wholeheartedly accepted this assumption as reasonable. This is not a logical assumption especially when Mr. Keckler has continued to dispatch his firefighter wife without even one remote dangerous accident or mishap.

Although this record is incomplete because this action was prematurely terminated by summary judgment, the Joint

Services Board offered no evidence of actual incidences where close family members acting as dispatchers for other family members caused or nearly caused an accident or dangerous mishap prior to the creation of Joint Services. If there were no actual dangerous incidences where people with close family relationships operated as dispatcher and dispatchee, then the reasoning of the Joint Services Board must be based upon a peculiar quality or characteristic of the marriage relationship that sets that relationship apart from others. That factor as articulated by the District Court is, "the mix of feelings which typically attends the marriage relationship thus could cripple law enforcement response and decrease the level of safety in the community at large should a dispatcher become unable to function adequately to handle dispatching duties during such a crisis." Sebetic v. Hagerty, 640 F.Supp. 1274, 1275 (E.D.Wis. 1986). This theory

is without objective support and is simply a generalization about married people that cannot stand. Emotional instability may or may not exist in any given individual but certainly cannot be shown to emerge as a result of marriage. If a person does not function well in a crisis, that is a personal characteristic, not one that is acquired with their marriage license. For every instance when a person falls apart in a crisis, there is an equal and opposite instance where another person overcomes the crisis and rises to or above it. The ability to respond well in a crisis involving a loved one, is not a characteristic of unmarried people and husbands any more than the failure to respond well in a crisis involving a loved one is a characteristic of married people and wives.

Prior to the creation of Joint Services in 1982, fathers and sons,

brothers, and other close family members who were male provided dispatch duties in the Kenosha Police Department, Kenosha County Sheriff's Department, and Kenosha Fire Department, for each other. This was not a safety concern. In 1982, with the creation of Joint Services, wives performing dispatch duties involving law enforcement spouses became an alleged safety concern. The difference lies in the passage of the dispatch duties from males who were closely related to females who were wives. Wives as women, have been historically characterized to be more emotional, less levelheaded, less dependable, less serious about their employment, more family oriented, and certainly unable to handle any crisis without assistance from their husbands.

Debra Heyden was a dispatcher for the Pleasant Prairie Police Department while her husband was a Kenosha County Sheriff's Deputy. She was aware on many occasions, by virtue of her radio

communication, of her spouse being dispatched on potentially dangerous calls. Her job performance for the Pleasant Prairie Police Department was at all times exemplary. There is no reason to believe her job performance would not have continued to be exemplary for Kenosha County. Whether or not Debra Heyden would be able to function adequately in a crisis involving her spouse is best evaluated by her past job performance record, and personal qualifications. Spontaneous generalizations embodying negative beliefs about a woman's ability to handle a crisis, cannot replace objectivity.

The lower courts resolved disputed factual issues on summary judgment concerning a dispatcher's discretionary functions in favor of respondent, holding, in effect, any discretion exercised by a dispatcher where a spouse might be involved was supportive of public safety concerns. Sebetic v.

Hagerty, 640 F.Supp. at 1277. (See App. G through P) Regrettably, affidavits and formal job descriptions leave much to the imagination as to the actual day-to-day operations in a work setting. Neither do affidavits and job descriptions provide depth and understanding concerning the impact of discretionary functions between two governmental departments. Only testimony can resolve the subtleties between the written description and the actual impact and effect of workplace activities. Only by a full review under the appropriate heightened standard will Debra Heyden show the limited impact of a dispatcher's discretionary functions and the degree of independence between Joint Services dispatchers and the departments they serve.

CONCLUSION

For all the reasons before stated, Debra Heyden respectfully requests this Court to grant her petition for a Writ of Certiorari to the Court of Appeals for

the 7th Circuit, and in doing so provide guidance and direction to courts and litigants as to what mix of rights will find gender discrimination of this nature constitutionally invalid.

Respectfully submitted,

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